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Motions, Pleadings and Filings

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United States District Court,
W.D. Oklahoma.
SEARCH KING, INC., an Oklahoma Corporation,
Plaintiff,
v.
GOOGLE TECHNOLOGY, INC., a California
Corporation, Defendant.
No. CIV-02-1457-M.

May 27, 2003.

Web site initiated action for tortious interference with contractual relations against internet search engine which ranked web sites, alleging that defendant maliciously decreased web site ranking it had previously assigned to plaintiff. Defendant moved to dismiss. The District Court, LaGrange, J., held that: (1) defendant's web site rankings were protected opinions, and (2) rankings were per se lawful and could not give rise to action for tortious interference with contractual relations.

Motion granted.

West Headnotes

[1] Torts ⚷211
379k211 Most Cited Cases
(Formerly 379k12)

[1] Torts ⚷212
379k212 Most Cited Cases
(Formerly 379k12)
Under Oklahoma law, action for tortious interference with contractual relations requires plaintiff to demonstrate: (1) defendant interfered with business or contractual relationship of plaintiff; (2) interference was malicious and wrongful, and was not justified, privileged, or excusable; and (3) plaintiff suffered injury as proximate result of the interference.

[2] Constitutional Law ⚷45
92k45 Most Cited Cases
Whether a published statement is within the protected class of speech as a matter of law is for the court. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚷90.1(9)
92k90.1(9) Most Cited Cases

[3] Torts ⚷242
379k242 Most Cited Cases
(Formerly 379k12)
Internet search engine's web site rankings according to relative significance of their correspondence to search queries were protected by First Amendment, against claim of tortious interference with contract, as opinions, relating to matters of public concern, which did not contain provably false connotations; although ranking system involved objective patented process, resulting rank was subjective, dependent on particular search engine's unique method of determining relative significance. U.S.C.A. Const.Amend. 1.

[4] Torts ⚷218
379k218 Most Cited Cases
(Formerly 379k12)

[4] Torts ⚷215
379k215 Most Cited Cases
(Formerly 379k12)
Under Oklahoma law, protected speech cannot give rise to claim for tortious interference with contractual relations because it cannot be considered wrongful, even if speech is motivated by hatred or ill will. U.S.C.A. Const.Amend. 1.
Brett D Sanger, Holly Hefton, Brett D Sanger PC,

Oklahoma City, for Search King Inc, an Oklahoma Corporation, plaintiff.

Joseph J Ferretti, Crowe & Dunlevy-OKC, Oklahoma City, for Google Inc, a California corporation, Google Technology Inc, a California Corporation, defendants.

ORDER

MILESLAGRANGE, District J.

*1 This matter is before the Court on Defendant Google Technology, Inc.'s ("Google") Motion to Dismiss Plaintiff Search King, Inc.'s ("Search King") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The matter has been fully briefed and is now ripe for determination. Upon review of the parties' submissions, and for the reasons set forth below, the Court grants Google's motion to dismiss.

I. Introduction

This case involves the interrelationship between Internet search engines and Internet advertising, and their collective connection to the First Amendment. More specifically, the questions at issue are whether a representation of the relative significance of a web site as it corresponds to a search query is a form of protected speech, and if so, whether the "speaker" is therefore insulated from tort liability arising out of the intentional manipulation of such a representation under Oklahoma law.

Google operates an Internet search engine. [FN1] Every search engine is controlled by a mathematical algorithm. One component of Google's mathematical algorithm produces a "PageRank," which is a numerical representation of the relative significance of a particular web site as it corresponds to a search query. The PageRank is derived from a combination of factors that include text-matching and the number of links from other web sites that point to the PageRanked web site. [FN2] The higher the PageRank, [FN3] the more closely the web site in question ostensibly matches the search query, and vice versa. Google does not sell PageRanks, and the web sites that are ranked have no power to determine where they are ranked, or indeed whether they are included on Google's search engine at all.

FN1. Search engines are indexing tools used to locate web sites that correspond to a user's search query. Search queries typically consist of one or more words or phrases that identify or are related to the subject of the search.

FN2. Although PageRanks are not displayed on Google's web site, they can be observed via a free "toolbar" that may be downloaded from Google's web site.

FN3. PageRank values range between 1 and 10.

Notwithstanding the fact that PageRanks cannot be purchased, they do have value. For example, highly-ranked web sites can charge a premium for advertising space. PR Ad Network ("PRAN," and together with Search King, "Search King"), which was introduced by Search King in August of 2002, capitalizes on this benefit by acting as a middleman, charging its clients a fee for locating highly-ranked web sites receptive to the idea of advertising on their sites, and in turn compensating those highly-ranked web sites with a portion of its fee. PRAN's fee is based, in part, on the PageRank assigned to the web site on which its client's advertisement and/or link is placed.

This action is based upon a PageRank reduction. From approximately February of 2001 until July of 2002, Search King's PageRank was 7. In July of 2002, Search King's PageRank was increased to 8. Before it was decreased, PRAN's PageRank was 2. In August or September of 2002, Search King's PageRank dropped to 4; PRAN's PageRank was eliminated completely, resulting in "no rank." The devaluation is alleged to have adversely impacted the business opportunities available to Search King and PRAN to an indeterminate degree by limiting their exposure on Google's search engine.

*2 Shortly after the PageRank decreases, Search King filed the instant action alleging tortious interference with contractual relations and seeking injunctive relief, [FN4] compensatory and punitive damages. Specifically, Search King alleges Google purposefully and maliciously decreased the PageRanks previously assigned to Search King, PRAN, and certain unidentified, affiliated web sites on Google's Internet search engine in August or September of 2002. Search King asserts the devaluation occurred after and because Google learned that PRAN was competing with Google and that it was profiting by selling advertising space on web sites ranked highly by Google's PageRank system. Google asserts it is immune from tort liability arising out of the devaluation because PageRanks constitute protected speech.

FN4. Search King's motion for a preliminary injunction was denied by previous order of this Court.

II. Discussion

Motions to dismiss a complaint for failure to state a claim should be granted only where "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). When considering a motion filed pursuant to Rule 12(b)(6) , "[a]ll well-pleaded factual allegations in the complaint are accepted as true ... and viewed in the light most favorable to the nonmoving party ...." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997) (internal citations omitted). "The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support [its] claims." *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002).

[1] Search King asserts a single cause of action--tortious interference with contractual relations. [FN5] Under Oklahoma law, such an action requires a plaintiff to demonstrate: (1) the defendant interfered with a business or contractual relationship of the plaintiff; (2) the interference was malicious and wrongful, and was not justified, privileged, or excusable; and (3) the plaintiff suffered injury as a proximate result of the interference. *See Daniels v. Union Baptist Ass'n,* 55 P.3d 1012, 1015 (Okla.2001). The parties concede that this case turns on the second factor. [FN6] The Court must, therefore, determine whether Google's manual decrease of Search King's PageRank was malicious and wrongful, and was not justified, privileged, or excusable. Google asserts that its actions cannot be considered wrongful because PageRanks constitute opinions protected by the First Amendment. In support of that proposition, Google relies on *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Services, Inc.,* 175 F.3d 848 (10th Cir.1999).

FN5. In its Amended Complaint, Search King identifies two "causes of action." However, the first simply consists of a request for injunctive relief and, as such, does not constitute a separate cause of action.

FN6. The Court will assume, *arguendo,* that one or more of Search King's contractual relationships was adversely affected by the PageRank decreases and that Search King was injured as a proximate result of those decreases.

In *Jefferson County,* the Tenth Circuit, relying on the Supreme Court's holding that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," *Jefferson County,* 175 F.3d at 852 (quoting *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)), held that First Amendment protection extended to a financial rating service's unfavorable review of the value of a school district's refunding bonds. *See id* . at 852-55. At the same time, the court dispensed with the school district's allegation that Moody's acted intentionally and with malice, noting that "even when a speaker or writer is motivated by hatred or illwill his expression [is] protected by the First Amendment." *Id.* at 857-58 (quoting *Hustler Magazine v. Falwell,* 485 U.S. 46, 53, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (alteration in original)). Based in large part on the constitutional protection afforded the review, the Tenth Circuit affirmed the district court order granting Moody's motion to dismiss the school district's claims for intentional interference with contract, intentional interference with business relations, and publication of an injurious falsehood. *See id.* at 860.

***3** Search King contends that PageRanks are objectively verifiable, and that *Jefferson County* is therefore distinguishable from the instant case. First, Search King notes that Lawrence Page ("Page"), the founder of Google and the inventor of the PageRank system, holds a U.S. patent on the system. Search King argues that because ideas are not patentable, *see Gottschalk v. Benson,* 409 U.S. 63, 67, 93 S.Ct. 253, 34 L.Ed.2d 273 (1972), and because patented products or processes must be replicable, *see* 37 C.F.R. § 1.71(a) (2003) (providing that a patent specification must "include a written description of the invention or discovery and of the manner and process of making and using the same, and is required to be in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which the invention or discovery appertains, or with which it is most nearly connected, to make and use the same"), the PageRank system must be objective in nature, and therefore capable of being proven true or false.

Next, Search King points out that in his doctoral thesis at Stanford University, Page describes the PageRank system as objective and mechanical, and also notes that Google's web site declares the PageRank system "honest and objective." Search King argues that Google cannot "have it both ways," professing the objectivity of the PageRank system on one hand, and relying on the subjective nature of the system in order to avoid tort liability on the other.

Two questions remain. First, are PageRanks constitutionally protected opinions? Second, if PageRanks fall within the scope of protection afforded by the First Amendment, is the publication of PageRanks *per se* lawful under Oklahoma law, thereby precluding tort liability premised on the intentional and even malicious manipulation of PageRanks by Google? The Court answers both questions in the affirmative.

[2][3] "It is always a question for the court to determine as a matter of law whether a published statement is within the protected class of speech." *Gaylord Entertainment Co. v. Thompson,* 958 P.2d 128, 142 (Okla.1998). Google argues that PageRanks are subjective opinions, not unlike Moody's review of the school district's refunding bonds in *Jefferson County.* Search King's first argument to the contrary, with respect to the requirement that patented processes be replicable, is not wholly without merit. Because patented processes must be capable of replication, it stands to reason that the intentional deviation from such a process would result in a provably false result to the extent the result would have been different in the absence of manipulation. However, this reasoning ignores the important distinction between process and result. Here, the process, which involves the application of the PageRank algorithm, is objective in nature. In contrast, the result, which is the PageRank--or the numerical representation of relative significance of a particular web site--is fundamentally subjective in nature. This is so because every algorithm employed by every search engine is different, and will produce a different representation of the relative significance of a particular web site depending on the various factors, and the weight of the factors, used to determine whether a web site corresponds to a search query. In the case at bar, it is the subjective result, the PageRank, which was modified, and which forms the basis for Search King's tort action.

***4** The Court finds Search King's alternative argument, with respect to certain statements regarding the purported objectivity of the PageRank system, is similarly unpersuasive. As discussed above, the objective nature of the PageRank algorithm, assuming it is adhered to by Google, is not in question. But neither is it at issue. At issue is the subjective result produced by an algorithm unique to Google. Just as the alchemist cannot transmute lead into gold, Google and Page's statements as to the purported objectivity of the PageRank system cannot transform a subjective representation into an objectively verifiable fact.

In view of the foregoing discussion, the Court concludes that *Jefferson County* is analogous to the case at bar. Like the review in *Jefferson County,* the Court finds that PageRanks relate to matters of public concern, in this case, via the "World Wide Web." In addition, the Court finds that PageRanks do not contain provably false connotations. PageRanks are opinions--opinions of the significance of particular web sites as they correspond to a search query. Other search engines express different opinions, as each search engine's method of determining relative significance is unique. The Court simply finds there is no conceivable way to prove that the relative significance assigned to a given web site is false. Accordingly, the Court concludes that Google's PageRanks are entitled to "full constitutional protection." *Jefferson County,* 175 F.3d at 852 (quoting *Milkovich,* 497 U.S. at 20).

Having determined that PageRanks are constitutionally protected opinions, the Court must now consider whether, under Oklahoma law, Google is immune from tort liability arising out of the intentional manipulation of PageRanks. In *Jefferson County,* the Tenth Circuit concluded that under Colorado law, protected speech cannot constitute improper interference in the context of a claim for tortious interference with contractual relations. *See id.* at 858. The Court finds that Oklahoma law compels the same conclusion in this case.

[4] In *Gaylord,* the Oklahoma Supreme Court held that constitutionally protected speech is *per se* lawful and, therefore, cannot give rise to an action for tortious interference with advantageous business relations. *See Gaylord,* 958 P.2d at 149-50. Notwithstanding that the elements of a tortious interference with advantageous business relations claim differ from the elements of a tortious interference with contractual relations claim, the Court would note that both claims require that the interference be *unlawful. See id.* & nn. 96, 97. Therefore, the Court finds that under Oklahoma law, protected speech--in this case, PageRanks--cannot give rise to a claim for tortious interference with contractual relations because it cannot be considered wrongful, even if the speech is motivated by hatred or ill will. *See Jefferson County,* 175 F.3d at 857-58. Accordingly, the Court finds that Search King has failed to state a claim upon which relief may be granted.

III. Conclusion

*5 In view of the foregoing, the Court hereby GRANTS Google's Motion to Dismiss [docket no. 12] and DISMISSES Search King's Complaint [docket no. 1] without prejudice. The Court DENIES Search King's Motion to Alter and/or Amend Judgment [docket nos. 14, 16] as moot.

Not Reported in F.Supp.2d, 2003 WL 21464568 (W.D.Okla.)

Motions, Pleadings and Filings (Back to top)

• 2002 WL 32387990 (Trial Motion, Memorandum and Affidavit) Google Technology, Inc.'s Response and Opposition to Plaintiff's Motion for Preliminary Injunction (Dec. 30, 2002)

• 2002 WL 32387991 (Trial Motion, Memorandum and Affidavit) Defendant's Motion to Dismiss and Supporting Brief (Dec. 30, 2002)

• 2002 WL 32387989 (Trial Motion, Memorandum and Affidavit) Plaintiff' Motion for Preliminary Injunction (Oct. 17, 2002)

• 5:02cv01457 (Docket) (Oct. 17, 2002)

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